

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

76-7539

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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PLS
ADRIANA SANCHES, ET AL

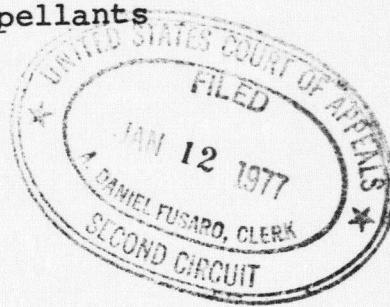
Plaintiffs-Appellees

v.

EDWARD MAHER, ET AL

Defendants-Appellants

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT



BRIEF OF APPELLANT

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ISSUES PRESENTED

The issues in the above-entitled civil action are fairly narrow.

On June 10, 1974, the co-defendants, Connecticut Welfare Department (CWD) and the Department of Health, Education and Welfare (HEW) filed a written Stipulation in the United States District Court for Connecticut in which CWD agreed to do certain things involving the hiring of English-Spanish speaking personnel to serve clients of the Department.

The pertinent issue involved in this Appeal concerns a promise by CWD in Paragraph 1 of the Stipulation whereby the Department promised to "immediately seek to hire ten (10) additional all-purpose bilingual English-Spanish workers". There was no language in this Stipulation in which CWD promised to fill any bilingual personnel vacancies which then existed.

Some 5 months and 10 days after the filing of the Stipulation, HEW raised the issue of whether or not CWD

should also have filled the twelve (12) vacancies existing.

After a meeting on July 18, 1975, between Edward Maher, the new Welfare Commissioner, and representatives of the co-defendant HEW, Mr. Maher wrote a letter dated August 15, 1975, in which he agreed to do certain things among which was to fill the twelve (12) vacancies.

After a hearing on HEW's Motion to Enforce the Stipulation so as to include filling the twelve (12) vacancies, the Court in an Order filed September 2, 1976, held that "the interpretation of the HEW-CWD Stipulation as set forth by HEW, the private plaintiffs, and Commissioner Edward W. Maher (HEW Exhibit 3, Maher letter of August 15, 1975) reflects the intent of the parties at the time the Stipulation was agreed upon".

The issues of the Appeal are as follows:

1. Could the Court go outside the clear language of the Stipulation, which was filed June 10, 1974, and consider extrinsic evidence, including a letter written some

fourteen (14) months after the filing of the Stipulation by a co-defendant who was not a party to the action at the time of filing, when such extrinsic evidence varies the terms of the filed Stipulation?

2. If extrinsic evidence is admissible to explain the terms of the Stipulation and intent of the parties, did this extrinsic evidence show that at the time of the filing of the Stipulation it was the intent of the parties to fill vacancies?

3. Did the Court err in refusing to allow the defendant Edward Maher to examine one Sam Fish, an attorney for HEW, concerning the circumstances surrounding the signing of the Stipulation and the intent of the parties on or about June 10, 1974?

STATEMENT OF THE CASE

1. On April 10, 1973, the plaintiffs in this civil action filed a Complaint in the United States District Court for Connecticut claiming that the Connecticut Welfare Department and its Commissioner, Nicholas Norton, were violating the Fifth and Fourteenth Amendment rights and the statutory rights pursuant to 42 U.S.C. §2000d of the plaintiffs by refusing to give sufficient services in Spanish to those public assistance recipients of Hispanic origin who desired services in Spanish.

2. In the same civil action, the plaintiffs also sued the Secretary of the Department of Health, Education and Welfare and certain of his employees alleging a failure on their part to protect these rights of the plaintiffs in that they did not enforce the constitutional and federal statutory rights against the defendant CWD and the defendant Nicholas Norton.

3. Thereupon, HEW actively entered the action, investigating the allegations of the plaintiffs by taking depositions from approximately fifty (50) CWD employees, filing motions for discovery, and meeting with CWD officials.

4. Sometime in the Spring of 1974, HEW sought to be dropped as a party defendant claiming that it had done all that was required of it in this law suit, and it was agreed between all the parties that on the signing of certain stipulations, one between the plaintiffs and HEW (Appellant's Appendix Page 39a), and one between HEW and CWD (Appellant's Appendix Page 36a), HEW could be dropped as a party defendant.

5. Thereon HEW and CWD signed a Stipulation which was filed in Court on June 10, 1974, (Appellant's Appendix Page 36a) and a Stipulation between the plaintiffs and HEW was filed in Court on July 11, 1974 (Appellant's Appendix Page 39a).

6. On July 11, 1974, the Court entered an Order dis-

missing the federal defendants as parties to the civil action. (Appellant's Appendix Page 43a).

7. The Stipulation between CWD and HEW in essence stated that CWD would

a) hire ten (10) more bilingual English-Spanish all-purpose workers,

b) hire ten (10) more bilingual English-Spanish Social Workers and stated how these hirings were to be accomplished, and

c) also set up a reporting system by CWD to HEW.

8. The Stipulation did not mention the number of English-Spanish all-purpose workers or English-Spanish Social Workers who were actually employed on or about the date the Stipulation between CWD and HEW was filed, but the parties have evidently agreed that at that time CWD had fifty-seven (57) bilingual all-purpose workers and five (5) bilingual Social Workers.

9. The Stipulation filed June 10, 1974 was prepared by HEW.

10. On November 21, 1974, John Bynoe, Director of the Office of Civil Rights of the Department of Health, Education and Welfare for Geographical Region I and an original defendant in the case, wrote Commissioner Nicholas Norton and for the first time informed Mr. Norton that the Stipulation not only meant that CWD was to hire ten (10) additional English-Spanish all-purpose workers and ten (10) English-Spanish Social Workers but that CWD was also supposed to fill the twelve (12) English-Spanish all-purpose vacancies that existed at the time the Stipulation was filed.

11. These twelve (12) English-Spanish all-purpose vacancies did, in fact, exist at the time the Stipulation was filed.

12. At no time up to the filing of the Stipulation on June 10, 1974 had there been any discussions between the defendant Nicholas Norton and his agents or HEW and its agents that the Stipulation should include filling any existing vacancies.

13. There is no language in the Stipulation referring to filling existing vacancies.

14. In January of 1975 a new administration took office in Connecticut and on February 1, 1975, the defendant Edward Maher became the new Commissioner of the Connecticut Welfare Department.

15. Mr. Maher had never previously worked for the Connecticut Welfare Department, had no knowledge that the civil action of Sanchez v. Norton existed, had never discussed this case with his predecessor, Nicholas Norton, and never until April of 1976 had ever personally read the Stipulation between CWD and HEW. (Appellant's Appendix Pages 101a, 102a and 103a)

16. On July 18, 1975, the defendant Edward Maher, without his counsel being present, met with representatives of HEW and one Attorney Stephen Holloway of the United States Justice Department in which the Stipulation was discussed. (Appellant's Appendix Page 103a)

17. At that meeting, the defendant Edward Maher relied solely on the representatives of the agents of HEW

as to what the Stipulation contained and its meaning, and at this meeting he was told that the Stipulation required him to fill twelve (12) existing all-purpose worker vacancies in addition to hiring ten (10) all-purpose workers and ten (10) Social Workers. (Appellant's Appendix Page 104a)

18. In a letter dated August 15, 1975 addressed to John Bynoe, the defendant Edward Maher stated that he understood, as a result of the meeting of July 18, 1975, that he was to fill existing vacancies. (Appellant's Appendix Page 72a)

19. If the defendant, Edward Maher had known at the time of the meeting or at the time of the writing of the letter of August 15, 1975, that the Stipulation did not require him to fill twelve (12) vacancies, he would not have made this statement in his letter of August 15, 1975. (Appellant's Appendix Page 104a)

20. Several months after the writing of this letter, HEW, claiming that CWD had not fulfilled the terms of the Stipulation, moved to re-enter the civil action

for the limited purpose of enforcing the terms of said Stipulation.

21. Said motion was granted by the Court and a hearing was held by the Court on April 19, 1976 and April 27, 1976.

22. During this trial, the Court refused to allow the defendant Edward Maher to examine one Sam Fish, an attorney for HEW, or put on the record why he wanted Sam Fish to testify as a witness.

23. At the time of this hearing, the Court found that there were seventy-one (71) fluent all-purpose workers now employed by CWD (now called the Department of Social Services), and because he found that the Stipulation included filling twelve (12) vacancies, the Court stated that the Department was eight (8) all-purpose workers short and thus had violated the terms of the Stipulation.

24. The defendant CWD (now called the Department of Social Services) claimed that they had started with fifty-seven (57) fluent all-purpose workers and hired fourteen (14) more which gave them seventy-one (71). They further claim that because they did not have to fill the vacancies,

hiring up to a total of sixty-seven (67) all-purpose workers satisfied the terms of the Stipulation and thus CWD had exceeded this requirement by four (4) all-purpose workers.

ARGUMENT

I

THE STIPULATION BETWEEN HEW AND CWD, FILED IN COURT ON JUNE 10, 1974, WHICH DOCUMENT REPRESENTED THE COMPLETE AGREEMENT OF THE PARTIES, CONTAINED NO LANGUAGE CONCERNING THE FILLING OF VACANCIES.

The claimed error of the Court in this present civil action is that instead of interpreting the Stipulation based solely on the language contained in the document itself, the Court interpreted the Stipulation in the light of statements made by the defendant Edward Maher in a letter dated August 15, 1975, a letter written some fourteen (14) months after the Stipulation was filed.

The Court stated in its Order of September 2, 1976, that it was basing its decision on "the interpretation

of the HEW-CWD Stipulation as set forth by HEW, the private plaintiffs, and Commissioner Edward Maher (HEW Exhibit 3, Maher letter of August 15, 1975)..." The Court claimed the above reflected the intent of the parties at the time the said Stipulation was agreed upon.

At the hearing of April 19, 1976 and April 27, 1976, the only evidence HEW and the private plaintiffs presented concerning the interpretation of the Stipulation was the Stipulation itself and Maher's letter of August 15, 1975. Therefore, the narrow issue in the appeal initially concerns the question of whether or not it was error for the Judge to consider anything outside the Stipulation in determining the intent of the parties as of June 10, 1974.

Interestingly, Mr. Koplan, counsel for HEW, admitted at the time of trial "as I understand the law of the case...the document speaks for itself". (Appendix, page 98a)

The defendant, Edward Maher, believes that the rules applicable to the construction of stipulations are generally the same as those used to construe contracts and urges this Court to apply these rules in the present appeal. 83 CJS 26, Section 11. In Re: Carroll, 247 So.2d 350, 354 (1971), Bekins Van and Storage Company v. The Industrial Commission of Arizona, 422 P.2d 400, 401 (1967).

Applying the rules of construction generally used in the law of contracts to the Stipulation in question, a cardinal rule is that where the intent of the parties is expressed in clear unambiguous language, there is no room for construction, and the Court will not do so, nor will the Court interpolate something into the contract not contained within the document.

"Where there is no ambiguity, the Court may not look beyond the language employed by the parties." New Wrinkle Inc. v. John J. Armitage, 238 F.2d 753, 757 (1956). See also Sterns v. Hertz Corp., 326 F.2d 405, 408 (1964), Pavlik v. Consolidated Coal Co., 458 F.2d 378, 380 (1972).

"Courts will not disregard the plain language of a contract or interpolate something not contained therein." Standard Oil Co. v. Ogden and Moffett Co., 242 F.2d 287, 292 (1957).

Further, a contract is ambiguous when, and only when, it is reasonably or fairly susceptible of different constructions or meanings. "Usually an ambiguity is said to exist when, from a consideration of the entire instrument, the meaning of the controverted words is capable of more than one meaning." United Packing-house Workers v. Maurer-Neuer, Inc., 272 F.2d 647, 649 (1959). See also Bakery and Confectionary Workers v. A & P Co., 357 F.2d 1322, 1325; Dipo v. Ringsly Truck Lines, 282 F.2d 126, 130 (1960).

In construing a contract, the question is not what intention or understanding may have existed at the time in the minds of the parties but what the intention was as expressed in the language of the contract itself. In re: Chicago and E.I. Ry Co., 94 F.2d 296, 299 (1938); Ginsberg v. Coating Products, Inc., 152 Conn. 592, 597 (1965), 210 A.2d 667.

Further, it is the intentions of the parties as they existed at the time of entering the contract that controls. Whitlock and Associates, Inc. v. Aaron, 383 F.2d 72, 76 (1957).

Applying these rules of construction to the Stipulation between HEW and CWD filed in Court on June 10, 1974, it is obvious that nowhere in that document is there any expressed intention of filling vacancies or doing any other type of hiring initially except hiring ten (10) additional fluent English-Spanish All-Purpose Workers and ten (10) additional English-Spanish bilingual Social Workers. Neither the word "vacancy" nor a synonym for the word "vacancy" appears in any sentence of the Stipulation.

The Stipulation is set forth in numbered paragraphs clearly expressing the intent of the parties at the time it was made. (Appendix, page 36a)

As stated above, paragraphs 1 and 2 cover the hiring of ten (10) additional All-Purpose bilingual workers and ten (10) bilingual professional Social Workers. Paragraph 3 refers to future Spanish-speaking capability of

the Department. Paragraph 4 describes the reporting system to be used by CWD. Paragraphs 5 and 6 discuss the fact that HEW will drop its activities in the present lawsuit against CWD but will not waive any further action against CWD under Title IV of the Social Security Act.

A careful reading of the entire Stipulation, or paragraph 2 of that document, shows that neither party ever raised the question of filling vacancies or even thought about the problem. During the testimony of April 19, 1976 and April 27, 1976, neither the co-defendant HEW, the plaintiffs, nor the Court ever pointed out any language in the Stipulation to support the proposition that the parties had intended to fill vacant positions besides hiring ten (10) additional bilingual All-Purpose Workers.

If it had been the intention of the parties on or some time shortly before June 10, 1974 to have CWD fill vacancies, it would have been a very simple matter to add a numbered paragraph to that effect. Nevertheless, HEW, whose agents prepared the Stipulation (Appendix page 98a).

never saw fit to include any language about filling vacancies in that document.

It is the defendant, Edward Maher's, contention that the lower court could have found no language from the Stipulation itself which would have allowed it to draw the conclusion that the parties intended that CWD should fill any bilingual vacancies for bilingual All-Purpose Workers over and above the ten (10) additional All-Purpose Workers they promised to hire, and, when the Court allowed extrinsic evidence into the case, particularly the letter of August 15, 1975, it committed error as a matter of law.

II

EXTRINSIC EVIDENCE SHOWS NO INTENTION BY THE PARTIES AT THE TIME OF ENTERING THE STIPULATION TO HIRE ANY MORE THAN TEN (10) FLUENT ALL-PURPOSE WORKERS.

Not only does the Stipulation contain no language concerning the filling of vacancies over and above hiring the ten (10) additional bilingual All-Purpose Workers, but the evidence up to the filing of the Stipulation clearly indi-

cates that the parties themselves only discussed the hiring of ten (10) additional bilingual All-Purpose Workers and ten (10) additional bilingual Social Workers.

The initial defendant in this civil action, Nicholas Norton, who was then Commissioner of Welfare for the State of Connecticut, was asked by the attorney representing HEW, at a deposition taken February 5, 1974, how many additional Spanish-speaking employees were needed by the Connecticut Welfare Department. Commissioner Norton answered stating that he thought that approximately ten (10) general All-Purpose Workers and approximately ten (10) Social Workers would be sufficient. (Appendix page 98a)

Shortly thereafter, Commissioner Norton met with HEW officials on March 28, 1974 and the following day wrote them a letter dated March 29, 1974, stating specifically what CWD would be willing to do in the way of hiring Spanish-speaking employees. He again stated that CWD would hire an additional ten (10) All-Purpose Workers and ten (10) Social Workers. Nowhere in that letter of

March 29, 1974 is there a promise to hire more than these ten (10) All-Purpose Workers and ten (10) Social Workers. Nowhere in the letter is there a commitment to fill vacancies. (Appendix page 78a)

In this letter, Commissioner Norton requested an answer from HEW by April 8, 1974, as to whether or not HEW would be satisfied with the terms set forth in his letter of March 29, 1974. On April 3, 1974, HEW, through its attorney, Stephen Passek, answered Commissioner Norton's letter of March 29, 1974, by sending a letter to Commissioner Norton's attorney. In this letter they referred to a conversation between Attorney Passek and Commissioner Norton's attorney and also stated that Commissioner Norton's offer of March 29, 1974, was generally acceptable with some small qualifications. None of these qualifications deal with filling vacancies. (Appendix, page 96a)

Referring to the conversation of April 2, 1974, which is mentioned in the letter of April 3, 1974, Commissioner Norton's attorney testified in the present case on April 19,

1976, that in all the conversations in which he was present between HEW and CWD no one ever raised the question of filling vacancies in addition to hiring the ten (10) bilingual All-Purpose Workers. (Appendix pages 99a, 100a)

Even the lower court appeared to believe, when testimony was given on April 19, 1976, that vacancies were never discussed between the parties before the Stipulation was signed for the simple reason that nobody ever thought about vacancies. (Appendix pages 99a, 100a)

Defendant's counsel would urge this Court to come to the same conclusion, that nobody ever thought about vacancies at the time the Stipulation was filed, and this question never arose until more than five (5) months passed after the filing of the Stipulation. This conclusion is amply bolstered by the letter of November 21, 1974, from John Bynoe, HEW's Director of the Office of Civil Rights for Region I, to Commissioner Norton. For the first time, HEW in this letter raised the issue that CWD should have hired ten (10) additional workers plus filled vacancies.

This interpretation came not from HEW or their counsel but from the plaintiffs' attorney, Mr. Hiller. (Appendix pages 69a-70a)

The problem with this claim by HEW, of course, is that there was no expressed intent to fill vacancies by the parties at any time up to the filing of the Stipulation, nor is there any language of that intention in the Stipulation. Further, there is no evidence in the case that the plaintiffs ever took part in the discussions between HEW and CWD. Because of this, they would be in no position to know what the negotiations were. Finally, the failure to put any language in the Stipulation concerning vacancies when the Stipulation was prepared by HEW is a problem of their own making. (Appendix page 98a)

It is a cardinal rule of law, if there is ambiguity in a written instrument, it will be construed most strongly against the party who prepared it. Chrysler Corporation v. Hanover Insurance Company, 350 F.2d 652, 655 (1965), New Wrinkle, Inc., supra, page 757.

The only extrinsic evidence that the lower court apparently used to interpret the Stipulation and come to the conclusion that it was the intention of the parties to hire ten (10) additional All-Purpose Workers plus fill existing vacancies was the letter of Edward Maher written August 15, 1975, some fourteen (14) months after the Stipulation was filed and some sixteen (16) months after the parties had agreed to its content. The Court referred to no other specific document except the Maher letter of August 15, 1975 in its Order of September 2, 1976, when it discussed what the intentions of the parties were in making the Stipulation. (Appendix page 44a)

The defendant, Edward Maher, has looked through the entire transcript of testimony of April 19, 1976 and April 27, 1976, and can find no other reference to evidence that would have been used by the Court as an aid in interpreting the Stipulation concerning the filling of vacancies.

The weakness of using the Maher letter of August 15, 1975, to interpret the Stipulation filed June 10, 1974,

is that all the evidence presented in Court shows that Commissioner Maher had absolutely no knowledge of the intention of the parties at the time the Stipulation was filed. Commissioner Maher's uncontradicted testimony of April 27, 1976, is to the effect that he had never read the Stipulation before writing the letter of August 15, 1975 (Appendix page 104a); he had never discussed the Stipulation with his attorney nor with his predecessor in office (Appendix page 103a); and during the short period he was Commissioner from February, 1975 to the meeting with HEW on July 18, 1975, he had spent most of his time before the Connecticut Legislature, which was then in session, and with familiarizing himself with his new duties. As a result, he had little time to devote to pending lawsuits. (Appendix pages 100a-101a)

Commissioner Maher further testified that he wrote the letter of August 15, 1975, based on the assumption that the information HEW gave him at the meeting on July 18, 1975, was correct (Appendix page 104a);

and, if he had known the context of the Stipulation at the time of the meeting of July 18, 1975, there would have been no question in his mind that his Department had fulfilled its obligations under the Stipulation.

(Appendix pages 103a-104a)

The first paragraph of the letter of August 15, 1975, strongly supports Commissioner Maher's testimony concerning his lack of familiarity about the intentions of the parties at or just prior to the time of the filing of the Stipulation on June 10, 1974.

Because of Commissioner Maher's admitted lack of knowledge of the circumstances and intentions of the parties at the time the Stipulation was signed and filed, the letter of August 15, 1975, should have no probative value at all as an aid to interpreting the Stipulation. There was no testimony presented to contradict Commissioner Maher nor was any testimony elicited from him to show that he was familiar with the intention of the parties on or before June 10, 1974. Even if the Court refused to believe any of Mr. Maher's testimony, a read-

ing of the letter of August 15, 1975, indicates his lack of knowledge of the evidence leading up to the signing of the Stipulation.

In this action the co-defendant bears the burden of showing failure to comply with the Stipulation. There is no burden on the defendant, Edward Maher, to show affirmatively that he did comply, and the record is completely barren of any evidence presented by HEW showing an obligation on the part of CWD to hire ten (10) additional All-Purpose Workers plus fill vacancies.

III

THE COURT ERRED IN REFUSING TO ALLOW TESTIMONY OF THE WITNESS, SAM FISH (MISNAMED IN THE TRANSCRIPT AS FISHER).

The defendant, Edward Maher, on April 27, 1976, requested that he be allowed to call as a witness one Sam Fish making the claim that Mr. Fish had attended all the meetings between the parties when the Stipulation was

discussed as a representative of HEW. (Appendix pages 104a-105a) , for the defendant, Edward Maher, wanted to ask Mr. Fish whether during any of the meetings up to the filing of the Stipulation there had been any discussion about filling any vacancies. (Appendix pages 105a-106a)

Also, the defendant, Edward Maher, wanted to ask Mr. Fish if the question of filling vacancies plus hiring ten (10) additional All-Purpose Workers had ever occurred to HEW until Mr. Hiller, the plaintiffs' attorney, mentioned it to Mr. Bynoe some time shortly prior to the writing of the letter of November 21, 1974. Finally, the defendant, Edward Maher, wanted to ask Mr. Fish if it were not true that the factual information contained in the letter of August 15, 1975 came solely from HEW.

The Court refused to allow Mr. Fish to testify.
(Appendix page 107a)

The defendant, Edward Maher, agrees that this ruling would have been a correct one if the Court were deciding

the intentions of the parties to the contract solely on the language of the Stipulation and without any recourse to any outside document or testimony. But once the Court allowed any document or testimony into the case as an aid to interpreting, then Mr. Fish became a necessary witness and not to allow him to testify was an error.

It is an evidentiary maxim that evidence is to be weighed according to the proof that was in the power of one side to produce and in the power of the other side to have contradicted. The failure to produce a witness who was available and who normally would have been produced by a party raises a strong presumption that any testimony elicited by that witness would have been unfavorable to the cause of the party which fails to produce him. Central National Bank v. Stodard, 83 Conn. 332, 340.

Once the Court had allowed extrinsic evidence to be used to show the intention of the parties to the Stipulation, and the defendant, Edward Maher, had presented tes-

timony, the failure of HEW to present Mr. Fish, and their very violent objection to him testifying, must lead this Court to the conclusion that he would have testified that filling vacancies was never discussed by the parties at any time prior to the filing of the Stipulation.

CONCLUSION

The Court on Page 3 of its Order of September 2, 1976, found the base figure for bilingual fluent English-Spanish All-Purpose Workers to be fifty-seven (57). (Appendix page 47a)

On Page 5 of that Order the Court held that CWD was to fill twelve (12) vacancies plus hire ten (10) additional All-Purpose Workers. (Appendix page 47a) This would require CWD to have a total of seventy-nine (79) fluent All-Purpose Workers to fulfill the terms of the Stipulation.

The Court on Page 6 of its Order found that CWD had hired a total of seventy-one (71) fluent All-Purpose

Workers and, therefore, was eight (8) short of the seventy-nine (79) and thus violated the terms of the Stipulation. (Appendix pages 47a-48a)

The defendant Edward Maher claims that the Court erred by including the twelve (12) vacancies in its count, and, because the Stipulation only required Commissioner Maher to hire ten (10) fluent All-Purpose Workers from the base figure of fifty-seven (57) for a total of sixty-seven (67) fluent All-Purpose Workers, he had exceeded the requirements of the Stipulation by four (4) when he had reached a total hiring of seventy-one (71) fluent All-Purpose Workers.

The defendant, Edward Maher, respectfully requests that this Court find that he has fulfilled his obligations under the Stipulation and reverse the United States District Court for the District of Connecticut.

Respectfully submitted,

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